STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Bell Telephone Company	)	
	)	00-0393
Proposed implementation of High	)	
Frequency Portion of Loop (HFPL)/Line	)	
Sharing Service. (Tariffs filed April 21, 2000)	)	

CORRECTED INITIAL COMMENTS ON REOPENING OF AT&T COMMUNICATIONS, INC., COVAD COMMUNICATIONS COMPANY AND WORLDCOM, INC. d/b/a MCI COMMUNICATIONS CORPORATION ON THE EFFECT OF THE FCC'S TRIENNIAL REVIEW ORDER ON THE ICC'S PROJECT PRONTO UNBUNDLING ORDERS

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ORAL ARGUMENT REQUESTED

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AT&T Communications Company ("AT&T"), Covad Communications Company ("Covad") and WorldCom, Inc. d/b/a MCI ("MCI") ("Intervening CLECs") respectfully submit the following Initial Comments on Reopening on the effect of the FCC's *Triennial Review Order*[1] on the ICC's *Project Pronto Unbundling Orders*.[2]

Executive Summary

On March 14, 2001, the ICC issued its first of three *Project Pronto Unbundling Orders*. In these *Project Pronto Unbundling Orders*, the ICC concluded that SBC is required to provide competitive local exchange carriers ("CLECs") with unbundled access to SBC's Project Pronto DSL architecture pursuant to Section 13-505.6 of the Illinois Public Utilities Act and Section 251 of the federal Telecommunications Act.[3] On October 2, 2003, the FCC issued its *Triennial*

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[1] *In the Matter of Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, *Implementation of Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, *Deployment of Wireline Service Offering Advanced Telecommunications Capacity*, CC Docket No. 98-147 (FCC 03-06), rel. August 21, 2003.

[2] Order, Docket No. 00-0393 (March 14, 2001) ("*Project Pronto Unbundling Order*"); Order on Rehearing, Docket No. 00-0393 (Sept. 26, 2001) ("*Project Pronto Unbundling Order on Rehearing*"); Order on Second Rehearing, Docket No. 00-0393 (March 28, 2002) ("*Project Pronto Unbundling Order on Second Rehearing*"). In its *Project Pronto Unbundling Order*, the ICC held that SBC was required to make available six network elements to allow competitors the ability to provide competing DSL services. In its *Project Pronto Unbundling Order on Rehearing*, the ICC held that instead of requiring SBC to provide the six individual network elements on an unbundled basis, SBC was required to provide a single "end-to-end" "Broadband UNE" encompassing the entire Project Pronto DSL architecture. The ICC also imposed an obligation on SBC to allow CLECs to install NGDLC line cards at SBC's remote terminals within 30 days of the CLEC request. SBC sought further rehearing. In its *Project Pronto Unbundling Order on Second Rehearing*, the ICC adopted a more lengthy process for SBC to deploy NGDLC line cards requested by CLECs.

[3] *Project Pronto Unbundling Order*, pp. 5, 13. The ICC further concluded that it could establish an interim HFPL rate pursuant to Section 13-801(g) of the Illinois Public Utilities Act. *Project Pronto Unbundling Order on Second Rehearing*, at 25. The ICC set the interim HFPL rate at $0.00. In the *Triennial Review Order*, the FCC held that "During this interim [transitional] period, we direct incumbent LECs to charge competitive LECs the same price for access to the HFPL for those grandfathered customers that they charged prior to the effective date of this Order." *Triennial Review Order*, ¶ 264. Accordingly, any challenge to the ICC's HFPL rate is moot since no matter what this Commission determines with respect to that rate, the $0.00 rate is the "price for access to the HFPL

Review Order. In its *Triennial Review Order* the FCC concluded that notwithstanding "the impairment competitive LECs face" without access to hybrid loops (e.g., the loops in SBC's Project Pronto DSL architecture), the FCC would not require ILECs to unbundle hybrid loops pursuant to Section 251 based upon its authority to "forebear" from requiring the unbundling of "advanced services" as set forth in Section 706(a) of the Communications Act.

In its October 30, 2003 Order, the Commission reopened this proceeding "to determine whether the Commission's unbundling decisions in this case are in conflict with federal law, and, if so, to determine the appropriate unbundling provisions to be established consistent with Illinois and federal law." *Order on Reopening* (Oct. 30, 2003), at 5. In other words, the Commission must determine whether Section 13-505.6 and the *Project Pronto Unbundling Orders* promulgated pursuant thereto are preempted by the FCC's *Triennial Review Order* and, if so, whether SBC is nevertheless required (by Illinois law or otherwise) to continue to provide unbundled access to its Project Pronto DSL architecture.

As set forth in detail herein, the ICC's *Project Pronto Unbundling Orders* do not conflict with, nor are they preempted by, the FCC's *Triennial Review Order* for two primary reasons.

First, Illinois law supports the ICC's *Project Pronto Unbundling Orders* independent of any obligations imposed on SBC under federal law; therefore, any change to federal law is irrelevant. The ICC's *Project Pronto Unbundling Orders* held that SBC is required to provide CLECs with unbundled access to its Project Pronto DSL architecture pursuant to Section 13-505.6 of the Illinois Public Utilities Act. Sections 13-505.6 and 13-801 provide the Commission with independent state law authority to "require additional unbundling [beyond that required by

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for those grandfathered customers that [SBC] charged prior to the effective date of [the *Triennial Review Order*]," and therefore, the only rate that SBC may charge CLECs on a going forward basis for HFPL access necessary to provision line sharing to the CLECs' embedded base of line sharing customers.

the FCC] of noncompetitive telecommunications services over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act." As the FCC explicitly acknowledges in its *Triennial Review Order,* the federal Telecommunications Act expressly preserves such independent state law unbundling authority.

***Second*,** the federal law (Section 706) invoked by the FCC to forebear from unbundling hybrid loops also grants the ICC the authority to reach a different determination regarding whether to forebear application of unbundling requirements; indeed, Illinois law requires a different determination. Specifically, the FCC's determination to forebear from requiring ILECs to unbundle hybrid loops was based on its determination that such forbearance would provide an incentive for the ILECs to invest in advanced services. Pursuant to the *SBC/Ameritech Merger Order*, however, SBC is already required to make substantial network upgrade investments in Illinois, including investments for advanced services. In addition, the Illinois Public Utilities Act requires SBC to develop facilities to provide Advanced Telecommunications Services to 80% of its customers by January 2005.[4] Accordingly, forbearance is unnecessary to promote investment in advanced services in Illinois.

It is also incorrect for the Commission to assume that its *Project Pronto Unbundling Orders* have been preempted by the FCC's *Triennial Review Order*. Indeed, this argument was specifically rejected by the Illinois federal court hearing SBC's appeal of the *Project Pronto Unbundling Orders*. Rather than accepting SBC's argument, and holding that the ICC's *Project Pronto Unbundling Orders* were preempted by the *Triennial Review Order* as a matter of law, the federal court found that "the Commission's decision may be consistent with the new federal

[4] 220 ILCS 5/13-517.

regime."[5] Therefore, the federal court remanded the *Project Pronto Unbundling Orders* back to the ICC to "reconsider" its Orders. Accordingly, no presumption of preemption is warranted under the law.

Sections 13-801 and 13-505.6 provide the Illinois Commission with state statutory authority and, in fact, an obligation to unbundle SBC's network elements. It would be patently impermissible for the Commission to interpret or apply the FCC's *Triennial Review Order* in a manner that limits this independent state law unbundling authority, or even narrows the application of state law. The Commission is required to implement the state statutes, irrespective of the Commission's views on their validity.[6] In fact, when SBC previously argued that this independent state law unbundling authority was preempted by federal law, the ICC, concluded that it could not even *consider* whether a state statute was preempted by federal law:

> Ameritech cannot hope to successfully raise a preemption argument here, in this proceeding. The Illinois Commerce Commission has no authority to declare an Act of the Illinois General Assembly preempted or otherwise unconstitutional. Accordingly, the Commission cannot consider Ameritech's argument that federal law preempts the application of Section 13-801, even if it determined that such arguments had a scintilla of merit.

ICC 01-0614 Order at ¶ 19. Instead, the ICC noted that it "ha[d] no choice but to enforce and give effect" to the statute as written, without consideration of Illinois Bell's preemption or constitutional doubt arguments. *Id.*

Argument

I. Illinois Law Supports the ICC's *Project Pronto Unbundling Orders*; Therefore, any Change to Federal Law is Irrelevant.

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[5] *Illinois Bell Telephone Company v. Kevin K. Wright, et al.,* Case No. 02 C 4121, November 12, 2003 Order, p. 2.

[6] *See* 220 ILCS 5/40-201 (ICC must ensure Public Utilities Act is "enforced and obeyed"); *Carpetland USA v. Illinois Dept. of Employment Security*, 201 Ill.2nd 351, 397 (2002); *Texaco-Cities Service*, 182 Ill.2d 262, 278 (1998).

A. The Project Pronto Unbundling Orders Are Based Upon Independent State Law Authority.

1. Docket 00-0393 Was Initiated Under Illinois, not Federal, Law.

On April 21, 2000, SBC filed an intrastate tariff offering to provide "HFPL/Line Sharing" to CLECs. According to SBC:

> [w]ith this filing, Ameritech Illinois introduces a new offering, High Frequency Portion of Loop (HFPL)/Line Sharing. This service is classified as a noncompetitive telecommunications service ***pursuant to the applicable provisions of the [Illinois] Public Utilities Act***. Proprietary treatment of cost support accompanying this filing is requested ***in accordance with the provisions of Section 13-502(c) of the Public Utilities Act***.

Exhibit A, cover page.[7] On June 1, 2000, pursuant to Section 9-201 of the Illinois Public Utilities Act, the ICC suspended SBC's state tariff and initiated Docket 00-0393 to determine whether SBC's tariff offering complied with Illinois and federal law.[8] Accordingly, SBC cannot dispute, and this Commission must find, that Docket 00-0393 was initiated under Illinois Law.

2. Docket 00-0393 Was Decided Under Illinois Law.

SBC's HFPL/Line Sharing tariff did not offer CLECs access to hybrid loops to provide line sharing, nor did SBC's tariff offer CLECs access to the HFPL at cost-based rates. The ICC concluded, however, that Section 13-505.6 of the Illinois Public Utilities Act and Section 251 of the federal Communications Act required SBC provide CLECs with access to its Project Pronto DSL architecture, and ordered SBC to modify its tariff offering accordingly.[9] In its *Project*

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[7] Indeed, the very first section of the tariff acknowledges that the offering is being made under Illinois law: "1.1 Loops and HFPL (High Frequency Portion of the Loop) are only available to telecommunications carriers for use in the provision of a telecommunications service as specified and to the extent required by . . . the Illinois Commerce Commission (ICC)." (Exhibit A, p. 2.)

[8] *Illinois Bell Telephone Company*, *Proposed Implementation of High Frequency Portion of Loop (HFPL) / Line Sharing Service*, ICC Dkt. No. 00-0393, *Suspension Order*, p. 2 (June 1, 2000) (invoking 220 ILCS 5/9-201).

[9] *Project Pronto Unbundling Orde*r, pp. 5, 13; *Project Pronto Unbundling Order on Rehearing*, pp. 37, 49; *Project Pronto Unbundling Order on Second Rehearing*, p. 81.

Pronto Unbundling Order, the ICC explained that its decision to unbundle hybrid loops was based upon its independent state law unbundling authority:

> The Commission also has specific state authority to order the unbundling of additional network elements. The PUA explicitly authorizes the Commission to impose unbundling requirements that exceed those set by the FCC.[10]

The ICC then specifically held that "Section 13-505.6 of the PUA grants the Commission authority to order unbundling of noncompetitive telecommunications services through a notice and hearing procedure, a procedure that has unquestionably occurred here." *Id.*, p. 13. In its *Project Pronto Unbundling Order on Second Rehearing,* the ICC held that it could establish an interim HFPL rate pursuant to Section 13-801(g) of the Illinois Public Utilities Act.[11]

> While we agree with Ameritech that it has not had its full day in court on the issue of the cost based rates that shall apply to the UNE in question here, that fact is not dispositive of the issue. Under section 13-801(g) the Commission is empowered to establish interim rates for UNEs within thirty days, on its own motion, where cost based rates have not been established.

Order on Second Rehearing, p. 25. Thus, there is no question that Docket 00-0393 was initiated and decided pursuant to Illinois law. Accordingly, in order for the Commission to reverse its *Project Pronto Unbundling Orders*, the Commission must first conclude that Section 13-505.6 and 13-801 of the Illinois Act are preempted by the FCC's *Triennial Review Order*.

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[10] *Project Pronto Unbundling Order*, p. 5 (*quoting* 220 ILCS § 13-505.6). Section 13-505.6 grants the ICC authority to require unbundling to ***a greater extent*** than any unbundling ordered by the FCC.

> Sec. 13-505.6. Unbundling of noncompetitive services. A telecommunications carrier that provides both noncompetitive and competitive telecommunications services shall provide all noncompetitive telecommunications services on an unbundled basis to the same extent the Federal Communications Commission requires that carrier to unbundle the same services provided under its jurisdiction. The Illinois Commerce Commission ***may require additional unbundling of noncompetitive telecommunications services*** over which it has jurisdiction based on a determination, after notice and hearing, that additional unbundling is in the public interest and is consistent with the policy goals and other provisions of this Act.

220 ILCS § 13-505.6. This Section of the Illinois Act is not a recent provision, having become effective on May 14, 1992, long before the 1996 adoption of Section 251 of the federal Act.

[11] 220 ILCS 5/13-801(g).

3. The ICC Has Frequently Required Unbundled Access to Network Elements Irrespective of the Unbundling Obligations Imposed by the FCC.

The ICC has often relied on provisions of the Illinois Public Utilities Act to promote competition in Illinois by requiring SBC to unbundle network elements in addition to those network elements required to be unbundled by the FCC. The ICC has invoked its state law unbundling authority on two specific, and significant occasions.

a. The *Ameritech/SBC Merger Order*: Shared Transport.

In the *Ameritech/SBC Merger Order*,[12] the Commission determined the conditions upon which it would allow Ameritech to merge with SBC. At the time of the *Ameritech/SBC Merger Order*, Ameritech asserted that the FCC could not order Ameritech to provide shared transport to CLECs because it was a "combination" of network elements prohibited by the Supreme Court's *IUB I* decision.[13] Nevertheless, the ICC concluded that under Illinois law Ameritech was required to provide common transport as a combination of network elements:

> We find that this condition to provide Shared Transport should continue even if the FCC eventually decides that unbundling Shared Transport is not proper in its UNE Remand docket. Section 7-204(f) gives this Commission the power to impose terms, conditions or requirements on this merger. . . .
>
> In the event that the FCC reverses its previous position and decides in its remand docket that shared transport should not be unbundled, the Joint Applicant's are directed to file with this Commission within 30 days of the FCC decision a petition seeking an Illinois-specific determination of the propriety of unbundling Shared Transport under Section 13-505.6. 220 ILCS 5/13-505.6.

Ameritech/SBC Merger Order, at 184.

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[12] *SBC Communications et al., Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company in Accordance with Section 7-204 of the Public Utilities Act,* ICC Docket No. 98-0555, Order, September 23, 1999 ("*Ameritech/SBC Merger Order*.").

[13] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997) ("*IUB I*"); *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) ("*IUB II*"); *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000) ("*IUB III*").

b. The *Wholesale/Platform Order*: UNE-P

In 1995, WorldCom petitioned the Commission to order Ameritech to provide a platform of network elements underlying Ameritech's retail services pursuant to Section 13-505.5 of the Illinois Public Utilities Act.[14] In the *Wholesale/Platform Order*, the Commission ordered Ameritech to provide access to the UNE-platform. Although the Complaint was brought prior to the adoption of the federal Telecommunications Act of 1996, the ICC's Order was issued after the promulgation of the Act. The Commission explicitly held that the UNE-platform was required under section 13-505.5 of the Illinois Act.

> No party contests that the service being requesting [sic] is a non-competitive service, not currently being provided by the responding LECs. The [Local Switching Platform] is already part of the network architecture and, therefore, technically feasible. Therefore, we find that the record establishes that [Worldcom] has satisfied the requirements of section 13-505.5, regardless of whether granting [Worldcom's] petition, as modified by Staff, may also be granted pursuant to section 13-505.6. For the reasons stated, we find it to be in the public interest that the [Worldcom] petition be granted.

Wholesale/Platform Order at 64.

B. The Federal Telecommunications Act Expressly Preserves The Independent State Law Authority Invoked By The ICC To Unbundle SBC's Project Pronto DSL Architecture.

Federal preemption of state authority is never presumed. Indeed, the United States Supreme Court has stated that it is reluctant to infer preemption of state laws by the federal government. In its previous interpretation of the Federal Communications Act of 1934, the U. S. Supreme Court identified the specific circumstances where it would find that a federal act preempts state authority in the same area.

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[14] *AT&T Communications of Illinois, Inc. Petition For A Total Local Exchange Wholesale Tariff/LDDS Communications, Inc. d/b/a LDDS Metromedia Communications Petition for a Total Wholesale Network Service Tariff,* ICC Docket Nos. 95-0458/0531, (Consol.), *Order,* June 26, 1996 ("*Wholesale/Platform Order*".)

> The Supremacy Clause of Art. VI of the Constitution provides Congress with the power to preempt state law. Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, when there is outright or actual conflict between federal and state law, where compliance with both federal and state law is in effect physically impossible, where there is implicit in federal law a barrier to state regulation, where Congress has legislative comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.

Louisiana Public Service Commission v. Federal Communications Commission, 476 U.S. 355, 368-369 (1986) (citations omitted). The text of the Communications Act itself clearly prohibits such a blanket finding of preemption.

Specifically, section 252(e)(3) of the Act, entitled "Preservation of authority" explicitly states that:

> [N]othing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.[15]

Likewise, Section 251(d)(3) of the Act, entitled "Preservation of State access regulations", states:

> In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that - (A) establishes access and interconnection obligations of local exchange carriers; (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.[16]

Similarly, Sections 261(b) and (c) of the Act, expressly allow state commissions to impose requirements necessary to further competition in the provision of telephone exchange service or exchange access so long as the requirements are not inconsistent with the Act.

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[15] 47 U.S.C. § 252(e)(3).

[16] 47 U.S.C. § 251(d)(3).

Finally, Section 601(c)(1) of the Act specifically rejects implied preemption under the Act, stating: "No implied effect- This Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State or local law unless expressly so provided in such Act or amendments."

When read in conjunction, these sections clearly preserve state authority to promote the competitive goals of the Act and establish a dual partnership between the state and federal government. Accordingly, the Act preserves Illinois' independent unbundling authority set forth in Section 13-505.6 of the Illinois Public Utilities Act.

1. The ICC's Independent State Law Authority Was Not Preempted by the FCC in its *Triennial Review Order*.

It is beyond dispute that the authority granted in Section 13-505.6 of the Illinois Public Utilities Act is not preempted by the FCC's *Triennial Review Order*. Nor could it be. While the FCC has the authority to interpret the Act, it does not have the authority to re-write it. Thus, notwithstanding any statements in the *Triennial Review Order*, the Act defines this Commission's authority and, as shown above, the Act does not evince any general Congressional intent to preempt state unbundling orders. Rather, the Act expressly preserves such state law authority. Indeed, the Supreme Court has interpreted these provisions of the Act to grant states the authority to unbundle elements in addition to those unbundled by the FCC, stating, "[i]f a requesting carrier wants access to additional elements, it may petition the state commission, which can make other elements available on a case-by-case basis."[17] Nothing the FCC asserts in its *Triennial Review Order* regarding a state's authority to unbundle elements in addition to those unbundled by the FCC trumps an Opinion of the United States Supreme Court interpreting the Act.

[17] *AT&T v. Iowa Utilities Bd.,* 525 U.S. 366, 388 (1999).

Should this Commission place unwarranted stock in the FCC's more restrictive interpretation of the Act in its *Triennial Review Order*, it is worth noting that even the FCC recognized that the aforementioned provisions of the Act expressly indicate Congress' intent not to preempt state regulation, and forbid the FCC from engaging in such preemption:

> Section 252(e)(3) preserves the states' authority to establish or enforce requirements of state law in their review of interconnection agreements. Section 251(d)(3) of the 1996 Act preserves the states' authority to establish unbundling requirements pursuant to state law to the extent that the exercise of state authority does not conflict with the Act and its purposes or our implementing regulations. ***Many states have exercised their authority under state law to add network elements to the national list***.[18]

The FCC further acknowledges in the *Triennial Review Order* that Congress expressly declined to preempt states in the field of telecommunications regulation:

> We do not agree with incumbent LECs that argue that the states are preempted from regulating in this area as a matter of law. If Congress intended to preempt the field, Congress would not have included section 251(d)(3) in the 1996 Act.[19]

Accordingly, the FCC has explicitly acknowledged that this Commission retains its independent unbundling authority under state law.

2. The FCC Held that State Law Authority is Preserved Unless the Exercise of That Authority Would "Substantially Prevent Implementation" of Section 251.

Section 251(d)(3) of the federal Act prohibits the FCC from preempting state access or interconnection regulations if they are (1) "consistent with the requirements of section 251" and (2) do not "substantially impede implementation of the requirements of this section [251] and

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[18] *See Triennial Review Order*, at ¶ 191 (emphasis added).

[19] *See Triennial Review Order*, at ¶ 192.

purposes of this part [§§ 251-61] of the Act."[20] The ICC's Project Pronto Orders satisfy both measures.

First, they are consistent with the requirements of Section 251. A requirement that SBC provide access to the broadband capabilities of hybrid loops does not prohibit SBC from carrying out any of the *requirements* of section 251, and is therefore both "consistent" with and does not "substantially impede [their] implementation." *See Florida Lime & Avocado Growers* v. *Paul*, 373 U.S. 132, 142-43, 145 (1963) (state statute imposing a more rigorous standard than a minimum federal law requirement was not conflict pre-empted, because there could be "dual compliance" and there was therefore no "inevitable collision between the two schemes, despite the dissimilarity of the standards"). Section 251 does not require that SBC deny access to these capabilities when they do not appear on the FCC's national list of network elements. In this regard, it is simply irrelevant that the ICC is requiring access to capabilities that the FCC's regulations do not require to be unbundled. As the Eighth Circuit has held, Section 251(d)(3) requires that a state policy be consistent only with the requirements of Section 251, not with the FCC's regulations.[21] And other courts of appeals have relied on these same principles in

[20] 47 U.S.C. § 251(d)(3). As the Supreme Court has stated, "the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency," *Louisiana PSC*, 476 U.S. at 374, and in section 251(d)(3) Congress unequivocally limited the FCC's authority to adopt regulations – including unbundling rules – that pre-empt state law requirements that are consistent with the Act's local competition provisions (§ 251(d)(3))

[21] *Iowa Utils. Bd.* v. *FCC*, 120 F.3d 753, 806-07 (8th Cir. 1997) (under section 251(d)(3), it is "entirely possible" for a state law requirement "to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251 and not substantially prevent the implementation of section 251 or [§§ 251-261]") (subsequent history omitted). Section 251(d)(3) demonstrates that Congress intended to "preserv[e] state authority" and represents "an explicit acknowledgment that there is room in the statutory scheme for autonomous state commission action." *Puerto Rico Tel. Co.* v. *Telecom. Reg. Bd. of P.R.*, 189 F.3d 1, 14 (1st Cir. 1999).

repeatedly upholding state commission determinations to impose additional unbundling requirements, even when federal regulations requiring the same result have been vacated.[22]

In its *Triennial Review Order* the FCC claimed to identify a narrow set of circumstances under which federal law would act to preempt state laws:

> Based on the plain language of the statute, we conclude that the state authority preserved by section 251(d)(3) is limited to state unbundling actions that are consistent with the requirements of section 251 and do not "substantially prevent" the implementation of the federal regulatory regime…
>
> [W]e find that the most reasonable interpretation of Congress' intent in enacting sections 251 and 252 to be that state action, whether taken in the course of a rulemaking or during the review of an interconnection agreement, must be consistent with section 251 and must not "substantially prevent" its implementation.[23]

In addition, based upon the Eighth Circuit's *Iowa Utilities Board I* decision the FCC specifically recognized that state law unbundling orders that are inconsistent with the FCC's unbundling orders are not *ipso facto* preempted. The Eighth Circuit held that §251 "does not require all State commission orders to be consistent with all of the FCC's regulations promulgated under section 251 … It is entirely possible for a State interconnection or access regulation, order, or policy to vary from a specific FCC regulation and yet be consistent with the overarching terms of section 251." *Iowa Utilities Bd.,* 120 F.3d at 806.[24] Accordingly, the FCC stated:

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[22] *See, e.g.*, *MCI Telecomm.* v. *U S West*, 204 F.3d 1262, 1268 (9th Cir. 2000) (the Act "reserves to states the ability to impose additional requirements [under state law] so long as the requirements are consistent with the Act and 'further competition.'"); *U S West Comm.* v. *MFS Internet, Inc.*, 193 F.3d 1112, 1120 (9th Cir. 1999); *Southwestern Bell* v. *Waller Creek Communications*, 221 F.3d 812 (5th Cir. 2000); *Illinois Bell Tel. Co.* v. *WorldCom Technologies, Inc.*, 179 F.3d 566, 573 (7th Cir. 1999) (the fact that the Act, or FCC's implementing rules, "do[] not require" a particular rule "is not to say that [they] prohibit[] it").

[23] *See Triennial Review Order, at ¶¶ 192, 194.*

[24] Indeed, the Act authorizes, and in some cases requires, ILECs to provide access to network elements that are not on the national list adopted in FCC regulations. See §252(a)(1) (authorizing interconnection agreements without regard to the requirements of §251); §271(c)(2) (requiring access to elements without regard to whether they are on the national list).

> That portion of the Eighth Circuit's opinion reinforces the language of [section 251(d)(3)], i.e., that state interconnection and access regulations must "substantially prevent" the implementation of the federal regime to be precluded and that "merely an inconsistency" between a state regulation and a Commission regulation was not sufficient for Commission preemption under section 251(d)(3).[25]

In sum, the FCC's *Triennial Review Order* confirms that "merely an inconsistency" between state rules providing for competitor access and federal unbundling rules is insufficient to create such a conflict. Rather, the FCC recognized that the state laws would not be subject to preemption unless they "substantially prevent implementation" of section 251. The Commission is not faced with this situation.

3. The FCC Did Not Conclude That Section 13-505.6 of the Illinois Public Utilities Act, or the *Project Pronto Unbundling Orders*, Would "Substantially Prevent Implementation" of the Act or the FCC's Rules.

In its *Triennial Review Order*, the FCC did not preempt ***any existing*** state law unbundling requirements, nor did it act to preclude the adoption of ***any future*** state law unbundling requirements. This is significant because the FCC was well aware that California and Minnesota had exercised their independent state law authority to unbundle the HFPL.[26] Likewise, the FCC was aware that Illinois, Wisconsin, Indiana, and Kansas had exercised their independent authority to unbundle hybrid loops.[27] The FCC declined to preempt this

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[25] See *Triennial Review Order*, ¶ 192 n. 611 (citing *Iowa Utils. Bd. v. FCC*, 120 F.3d at 806).

[26] **California:** CPUC Docket No. R.93-04-003/I.93-04-002; Open Access and Network Architecture Development, Permanent Line Sharing Phase, D. 03-01-077(Jan. 30, 2003); **Minnesota:** MPUC Docket No. P-999/CI-99-678; *In the Matter of a Commission Initiated Investigation into the Practices of Incumbent Local Exchange Companies Regarding Shared Line Access* (Oct. 8, 1999).

[27] **Illinois:** ICC Docket No. 00-0393; P*roposed Implementation of High Frequency Portion of Loop (HFPL)/Line Sharing Service* (March 14, 2001); **Wisconsin:** WPSC Docket No. 6720-TI-161; Investigation into Ameritech Wisconsin's Unbundled Network Elements (March 22, 2002); **Indiana:** *IURC Cause Number 40611-S1, Phase II; In the Matter of the Commission Investigation and Generic Proceeding on Ameritech Indiana's Rate's for Interconnection, Service, Unbundled Termination Under the Telecommunications Act of 1996 and Related Indiana Statutes* (Feb. 17, 2001); **Kansas:** KCC Docket No. 01-GIMT-032-GIT; *In the Matter of the General Investigation*

Commission's Orders, or any of these unbundling orders, stating only that "in *at least some circumstances* existing state requirements will not be consistent with our new framework and may frustrate its implementation."[28] Accordingly, the FCC has specifically acknowledged that in many circumstances state law unbundling of the hybrid loops *would be* consistent with the FCC's framework and would not frustrate its implementation.

Recognizing that its ability to preempt state unbundling orders consistent with the Act was limited (if existent at all), the FCC declined to issue a blanket determination that all state orders unbundling hybrid loops were preempted. Rather, the FCC invited parties to seek declaratory rulings from the FCC regarding whether individual state unbundling orders "substantially prevent implementation" of Section 251. Although the FCC asserts that it may be "*unlikely*" to refrain from preempting a state law or Order that required the "unbundling of network elements for which the Commission has either found no impairment . . . or otherwise declined to require unbundling on a national basis."[29] It is important to note that even pursuant to this oddly qualified presentation the FCC expressly refused to conclude that an order unbundling hybrid loops would be preempted as a matter of law, thereby signaling to state commissions that hybrid loops could be unbundled under particular circumstances without challenge. The unlikelihood of refraining to preempt must be weighed, the FCC admits, against a test of what "substantially" prevents implementation of the Act. The Commission's *Project Pronto Unbundling Orders* do not "substantially" prevent implementation of the Act; indeed, the opposite is the case.

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to Determine Conditions, Terms, and Rates for Digital Subscriber Line Unbundled Network Elements, Loop Conditioning, and Line Sharing (Jan. 13, 2003).

[28] *See Triennial Review Order*, ¶ 195.

[29] *See Triennial Review Order*, ¶ 195.

4. State Law Access Requirements Are Valid "As Long as the Regulations Do Not Interfere With the Ability of New Entrants to Obtain Services."

The basis for a proper analysis to determine whether state unbundling laws impermissibly conflict with the federal regulatory regime is set forth in *Michigan Bell v. MCIMetro*, 323 F.3d 348 (6th Cir. 2003). In *Michigan Bell*, the Sixth Circuit Court of Appeals refused to preempt an Order of the Michigan Public Service Commission (allowing MCI to transmit resale orders by fax pursuant to SBC's Michigan tariff offering, when MCI's interconnection agreement required electronic submission of orders) which SBC argued "conflicted" with MCI's interconnection agreement, and hence, SBC alleged, with MCI's obligations under the Act. In its preemption analysis the Sixth Circuit first noted that the MPSC's authority was expressly preserved by the Act:

> When Congress enacted the federal Act, it did not expressly preempt state regulation of interconnection. ***In fact, it expressly preserved existing state laws that furthered Congress's goals and authorized states to implement additional requirements that would foster local interconnection and competition***, stating that the Act does not prohibit state commission regulations 'if such regulations are not inconsistent with the provisions of [the FTA].'[30]

The Court then explained that "as long as state regulations do not prevent a carrier from taking advantage of sections 251 and 252 of the Act, state regulations are not preempted."[31] The Court later reiterated that an order of a state commission would be affirmed provided that it "does not frustrate the purposes of the Act."[32]

The ICC's Order does not substantially impede implementation of the requirements of Section 251 or the purposes of Sections 251-61 of the Act. Because Section 251 does not require SBC to deny access to broadband capabilities, the ICC's Order does not substantially impede

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30 *Michigan Bell,* 323 F3d at 358 (emphasis added).

31 *Michigan Bell,* 323 F3d at 359.

32 *Michigan Bell,* 323 F3d at 361.

implementation of any requirement of Section 251. Nor does it substantially impede implementation of any of the purposes of Sections 251-61 of the Act. These provisions prohibit only state laws that erect barriers to entry (Section 253), and they authorize incumbent LECs to agree voluntarily to provide access to any of their capabilities. *See id.* Sections 252(a)(1), 252(e)(2)(A)-(B) (if incumbents and entrants agree to provisions of an interconnection agreement, the provisions are to be approved "without regard to the standards set forth in subsections (b) and (c) of section 251" or the FCC's implementing regulations). So there is no purpose of the Act that is subverted by a state requirement that gives competitive carriers additional unbundling rights – even in circumstances where the FCC has made the finding required by Section 251(d)(2) and determined that competitive carriers will *not* be impaired if access to a particular capability is denied.[33]

But here the matter is far simpler, for the FCC did not find (and could not find) that competing carriers are not impaired if they are denied access to broadband capabilities of hybrid copper-fiber loops. To the contrary, the FCC found impairment. *Triennial Review Order* ¶ 286. The FCC refused to require access to these capabilities as a matter of federal law because the FCC wanted to implement Section 706 of the Telecommunications Act of 1996 by giving incumbents greater incentives to invest in broadband capabilities and the FCC found that limiting competition in broadband, and assuring that incumbents can earn monopoly (or duopoly) returns, would lead to more broadband investment. *Id.* ¶¶ 290, 292. Even assuming, *arguendo,* that this

[33] For example, the state unbundling requirement would plainly be consistent with the purposes of §§ 251-61 if a state commission examined conditions in that state, found that competing carriers would be impaired if access to an element were denied, and if there is substantial evidence supporting the state commission finding. In those circumstances, it would have been permissible for the FCC to have ordered the unbundling, and a state could not be held to have acted "inconsistent[ly] with the purposes" of §§ 251-61 merely because it resolved conflicting evidence differently than had the FCC. In that circumstance, the state's requirement is inconsistent *only* with the FCC's determinations and the FCC's regulations. The state's requirement is not then inconsistent with the purposes of the local competition provisions, which is the inquiry under the plain terms of § 251(d)(3) and the court of appeals precedents. *See Iowa Utils. Bd.* 120 F.3d at 806-07.

was a reasonable interpretation of Section 706, the ICC's state unbundling requirement is valid so long as it does not substantially impede implementation of the purposes of Sections 251-61. The purpose of *these* provisions is to foster competition and end monopolies or duopolies, and the ICC's Order plainly achieves *those* purposes.

An order requiring access to hybrid loops under Illinois law would not prevent a carrier from taking advantage of the network opening provisions of the Act, nor would such unbundling frustrate the purposes of the Act. The Court unequivocally stated:

> The Commission can enforce state law regulations, ***even where those regulations differ from the terms of the Act*** or an interconnection agreement, as long as the regulations do not interfere with the ability of new entrants to obtain services.[34]

Accordingly, contrary to the FCC's implication, seemingly so certain, that it is "unlikely" that state laws requiring access to hybrid loops would escape preemption, it is clear that this Commission had, and continues to have, the authority to implement the Section 13-505.6 of the Illinois Public Utilities Act and require access to hybrid loops under Illinois law. Such an order does not interfere with the ability of new entrants to obtain services; indeed it does the opposite.

II. The Federal Law (Section 706) Invoked By The FCC To Forebear From Unbundling Hybrid Loops Also Grants The ICC The Authority To Reach A Different Determination Regarding Whether To Forebear Application Of Unbundling Requirements; Indeed, Illinois Law Requires A Different Determination.

In its *Triennial Review Order* the FCC concluded that notwithstanding "the impairment competitive LECs face" without access to hybrid loops, the FCC would not require hybrid loops to be unbundled. Specifically, the FCC declined to order ILECs to unbundle hybrid loops based upon two findings. First, the FCC invoked the authority of Section 706(a) to employ "regulatory

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[34] *Michigan Bell,* 323 F3d at 361.

forbearance" over hybrid loops, concluding that "applying section 251(c) unbundling obligations to these next-generation network elements [hybrid loops] would blunt the deployment of advanced telecommunications infrastructure by incumbent LECs and the incentive for competitive LECs to invest in their own facilities."[35] Second, the FCC concluded that "the impairment competitive LECs face" without access to hybrid loops is addressed by "unbundled access to incumbent LEC copper subloops" and "TDM-based loops."[36] As set forth below, this Commission is vested with authority pursuant to Section 706(a) to require unbundling of hybrid loops, and to conclude that the alternative broadband access cited by the FCC is insufficient to overcome "the impairment competitive LECs face" without access to hybrid loops.

A. Unbundling Project Pronto Would Promote The Deployment Of Advanced Telecommunications Infrastructure in Illinois.

In attempting to justify its deregulation of hybrid loops the FCC cloaked itself in the authority conferred by Section 706(a) of the Telecommunications Act of 1996, which directs the FCC to "encourage the deployment" of advanced telecommunications services.[37] Yet in making its national finding the FCC blatantly ignored the express language of Section 706, which provides:

> The Commission ***and each State commission*** with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote

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[35] *Triennial Review Order*, ¶ 288.

[36] *Triennial Review Order, ¶ 288.*

[37] 1996 Act, § 706. The Commission posits that it gains its authority to preemptively deregulate fiber and packet facilities through § 706's direction to encourage deployment of broadband services, in combination with § 251(d)(2)'s provision that, in defining UNEs, the commission must consider "at a minimum" the "necessary" and "impair" standards. *Triennial Review Order*, ¶¶ 234, 286, 288.

> competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.[38]

Accordingly, Section 706(a) grants this Commission authority equal to that granted the FCC, and thus, confers upon this Commission equal authority to determine that unbundling hybrid loops will encourage the deployment of advanced telecommunications services in Illinois.

1. "Regulatory Forbearance" Pursuant to Section 706(a) Is Not Necessary to Encourage Advanced Services Deployment by SBC.

The evidence in this proceeding demonstrates that SBC is legally obligated to deploy advanced services, like is Project Pronto DSL architecture, in Illinois. As a condition to the approval of the Ameritech/SBC merger in 1999, the Commission extended the Network Infrastructure Investment Plan that had been in place as a condition to approving the Ameritech Alternative Regulation Plan.[39] Condition 7 of the Ameritech/SBC Merger Order requires that SBC invest at least $3 billion during the period from 2000 through 2005. SBC agreed to comply with the requirements of the Order in exchange for Commission approval.[40] In its Order approving the continuation of Alternative Regulation for SBC, the Commission directed that the whole of the $3 billion dollar investment requirement it set out in the *Merger Order* be maintained, specifying that upon the expiration of that requirement, SBC would be required to target $1.8 billion of additional investment to cover years 2005, 2006, and 2007. In addition, the Commission noted that in the event that its next Alternative Regulation Plan review is not

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[38] 1996 Act, § 706(a) (emphasis added).

[39] Ameritech/SBC Merger Order, p. 244.

[40] *SBC Communications et al., Joint Application for Approval of the Reorganization of Illinois Bell Telephone Company in Accordance with Section 7-204 of the Public Utilities Act,* ICC Docket No. 98-0555, Order, September 23, 1999 ("*Merger Order*"), Network Infrastructure Investment Condition Number 7, p. 240.

completed by the end of year 2007, an annual investment of $600 million, or portion thereof, is required up to the time of the entry of an order- either continuing or terminating the Plan.[41]

In its first report with the ICC on the nature of its investments, SBC specifically acknowledged that much of the annual investments were directed toward SBC's Project Pronto digital facilities to provide advanced services:

> Ameritech Illinois's deployment of remote digital switches has provided an effective solution to provide transitional area customers with access to advanced services beyond POTS [plain old telephone service].[42]

In addition, Section 13-517 of the Illinois Act requires that SBC provide advanced telecommunications services to not less than 80% of its customers by January 1, 2005.[43]

Accordingly, "regulatory forbearance" pursuant to Section 706(a) is unnecessary to encourage advanced services deployment in Illinois.

The evidence in this proceeding further demonstrates (1) that SBC planned and initiated its deployment of its hybrid loop architecture at a time when it knew it was subject to unbundling requirements, and (2) that SBC would deploy its hybrid loop architecture whether or not it was capable of delivering advanced services. Specifically, SWBT's Investor Briefing reflects that "The network efficiency improvements alone will pay for this initiative," and that deployment of Project Pronto will result in "Annual Savings of 1.5 Billion by 2004." Accordingly, the record is clear that SBC planned to deploy and will deploy Project Pronto in order to reap the tremendous financial efficiencies it has touted to its investors, regardless of any unbundling requirements.

2. "Regulatory Forbearance" Pursuant to Section 706(a) Is Not Necessary to Encourage Advanced Services Deployment by CLECs.

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41 *See* Amendatory Order, Docket 98-0252, et al., pages 211-212, issued February 14, 2003.

42 Compliance Review of Year 2000 Network Infrastructure Investment Report, Vol. III, ch. 1, p. 4 (available at http://www.icc.state.il.us/rl/library.aspx?key=Telecom&key=Condition%207.)

43 220 ILCS 5/13-517(a).

There is little question that "regulatory forbearance" pursuant to Section 706(a) that results in denying CLECs access to SBC's Project Pronto DSL architecture will thwart CLEC investment in facilities-based advanced services. Furthermore, the record contains no evidence that denying CLECs access to hybrid loops will encourage such investment. In Illinois, collocation at remote terminals is vastly more expensive than collocation at central offices ("CO") due to the larger number of collocations and the diminishing access to customers per collocation arrangement. As this Commission has recognized, "While, collocation of DSLAMs in RTs offers an alternative, even the FCC has recognized in the Line Splitting Order that it is a costly alternative that will not be uniformly available in every RT. Collocation is limited by space constraints, is quite expensive (and may even be uneconomic in many or most RT locations), and takes considerable time to deploy."[44] The Commission further concluded that with regard to SBC's expenditure on Project Pronto: "It would be nearly impossible for any CLEC to approach the magnitude of SBC's Project Pronto effort in terms of cost and geographic scope. Even if equivalent financial resources were available, self-provisioning would cause market entry to be so late that meaningful competition would be precluded."[45]

Under these cost constraints, there is little question that, in Illinois, far from using copper subloops to compete with SBC's Project Pronto offering, competitors would simply refrain from competing at all for these primarily residential customers. This would directly result in a corresponding absence of investment in central office collocated facilities, local network packet switching capability, and backhaul network capacity. Thus, there is little question that in Illinois, the lack of an unbundling requirement for Project Pronto will lead to a corresponding lack of investment in facilities-based competition by CLECs. As this Commission has concluded: "No

[44] Project Pronto Unbundling Order, at 23.

[45] Project Pronto Unbundling Order, at 23.

competitive advanced services provider has the financial resources to match SBC's investment, in whole or in part, in the Project Pronto architecture."[46]

3. "The Impairment Competitive LECs Face" Without Access To Hybrid Loops Is Not Addressed By "Unbundled Access To Incumbent LEC Copper Subloops" and "TDM-Based Loops."

There is little question that in Illinois, copper subloops and TDM-based loops are not true alternatives to unbundled access to packetized hybrid fiber-copper facilities. As explained above, in Illinois, collocation at remote terminals is vastly more expensive than collocation at central offices due to the larger number of collocations and the diminishing access to customers per collocation arrangement. Furthermore, TDM transmission facilities, such as a DS1 loop, are not true substitutes for packetized broadband transmission facilities in Illinois. In Illinois, a UNE DS1 loop has a non-recurring charge and a monthly recurring charge that are significantly more expensive than the equivalent charges for a DSL loop. Clearly, consumers and home-based businesses cannot afford (and do not need) the higher cost DS1 services. TDM-based services offer symmetric services and service level guarantees more suitable to certain classes of business customers – not substitutes for SBC's mass market broadband offerings. Thus, unlike the FCC's national impairment finding, access in Illinois to copper subloops and TDM transmission facilities does not alleviate competitors' need for access to the unbundled packetized transmission capabilities of hybrid fiber-copper loop facilities.

Likewise, access to copper subloops is not a viable alternative to SBC's Project Pronto DSL architecture. The overwhelming evidence in the record demonstrates that access to subloops is not a feasible alternative because it would require CLECs either to collocate a line card in an SBC remote terminal, or to collocate a DSLAM at the remote terminal. As this

[46] Project Pronto Unbundling Order, at 19.

Commission has acknowledged, SBC has steadfastly refused to allow CLECs to collocate line cards in its RTs. RT collocation is limited by space constraints, is prohibitively expensive and takes considerable time to deploy. The cost of collocating in all or even at most RTs is prohibitive and would materially impair a CLEC's ability to provide xDSL-based services in Illinois. Thus, access to subloops is not currently feasible, and thus not a viable alternative to CLEC access to end-to-end broadband loops configured over hybrid facilities.

Accordingly, for the reasons set forth above, the FCC's *Triennial Review Order* does not preclude this Commission from unbundling access to SBC's Project Pronto network architecture because this Commission has an independent policy making role pursuant to § 706(a) to conclude that it is inappropriate to forebear from unbundling hybrid loops.

III. Even Assuming That the Commission Concludes that its Orders in 00-0393 Were Based on a Change in Federal Law, SBC's Project Pronto DSL Architecture Must Be Unbundled Pursuant to Illinois Law.

Even if the Commission concludes that its *Project Pronto Unbundling Orders* must be modified as a result of the *Triennial Review Order* (which it should not), consistent with its Order on Reopening, the Commission must then "determine the appropriate unbundling provisions to be established consistent with Illinois and federal law." Order on Reopening (Nov. 25, 2003), at 5. As set forth below, SBC must continue to provide unbundled access to it Project Pronto DSL architecture by virtue of the requirements of Section 13-801 and for numerous additional reasons.

A. Section 13-801 Requires that SBC, as a Condition to Being Regulated Under Section 13-506.1, Make its Network Elements to Competitors.

In addition to the unbundling obligations imposed on ILECs pursuant to Section 13-505.6, Section 13-801 of the Illinois Public requires that the Illinois Commission unbundled

SBC's network elements to the "fullest extent possible to implement the maximum development of competitive telecommunications service offerings." 220 ILCS 5/13-801(a). Any noncompetitive carrier that elects to be excused from rate of return regulation, as SBC has done, is subject to additional unbundling requirements imposed by this section. The purpose of this section is to ensure that in those areas where an incumbent carrier is excused from rate of return regulation for its customers, competitive entry by alternative companies is promoted to the maximum extent possible. Section 13-801 independently requires that the Commission make SBC's Project Pronto architecture available to competing CLECs.

1. SBC Has Elected to be Regulated Under an Alternative Form of Regulation, and Thereby Subjects itself Voluntarily to Section 13-801.

In 1988, SBC (then Illinois Bell) field its petition with the Illinois Commerce Commission to be regulated on a basis other than rate of return.[47] The ICC granted the company's request, but in 1990 the Illinois Appellate Court invalidated the alternative regulation regime on the basis that it was beyond the ICC's authority.[48] Then in 1992, apparently in response to the court's decision, the Illinois legislature adopted Section 13-506.1 of the Act. This section vests the Commission with the ability to approve of an alternative form of regulation if the incumbent carrier satisfies certain preconditions. In adopting Section 3-506.1, however, the Act "express[ed] the legislature's determination that the telecommunications industry must be transformed from a regulated monopoly into a system of fully competitive markets."[49] The legislature saw the statute as "a tool to move the telecommunications industry

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47 *See Ill Bell. Tel. Co.*, 669 N.E.2d at 924.

48 *See Ill. Bell. Tel. Co. v. Ill. Commerce Comm'n*, 561 N.E.2d 426, 438 (Ill. App. Ct. 1990).

49 *Ill Bell. Tel. Co.*, 669 N.E.2d at 925.

from monopoly to market."[50] In this regard, the legislature explicitly stated that "it is the policy of the State of Illinois that . . . when consistent with the protection of consumers of telecommunications services . . ., competition should be permitted to function as a substitute for certain aspects of regulation."[51]

Taking advantage of its new opportunity, SBC (then Illinois Bell) requested that the Commission regulate its operations based not on the rate of return, but on a price cap basis. Under this scenario, SBC's prices for retail services could be increased based on an inflation index, but its profits were no longer subject to Commission review.[52] Soon thereafter, Illinois Bell filed its own proposal with the ICC as part of a multi-state effort by Ameritech, Illinois Bell's parent company, to win the right to offer long-distance service in exchange for providing local competitors unbundled access to network elements.[53] In response, the ICC issued a comprehensive order "requiring incumbent LECs to unbundle their networks and to offer interconnection at all 'logical connection points'" and to take other steps to permit local phone competition.[54]

Soon after the Commission approved of SBC's alternative regulation plan and entered its 1994 and 1995 orders, WorldCom and AT&T filed their request that the Commission unbundled SBC's network and make the network elements available to competitors at cost-based pricing.[55]

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[50] *Id. at 924.*

[51] 220 Ill. Comp. Stat. 5/13-103(b).

[52] *See* Order, *Illinois Bell Telephone Company: Petition to Regulate Rates and Charges of Noncompetitive Services Under An Alternative Form of Regulation*, ICC Docket No. 92-0448, 1994 Ill. PUC LEXIS 437 (rel. Oct. 11, 1994).

[53] *See* Order, *Illinois Bell Telephone Company: Proposed introduction of a trial of Ameritech's Customers First Plan in Illinois*, ICC Docket No. 94-0096, 1995 Ill. PUC LEXIS 230, at *6-7 (rel. Apr. 7, 1995).

[54] *Id.* at *99 - *100.

[55] *AT&T Communications of Illinois, Inc. Petition For A Total Local Exchange Wholesale Tariff/LDDS Communications, Inc. d/b/a LDDS Metromedia Communications Petition for a Total Wholesale*

In its *Wholesale/Platform Order*, the Commission ordered Ameritech to provide the UNE-platform of network elements, either combined or individually, underlying all of the existing Ameritech retail services. The Commission explicitly held that the UNE-platform was required under section 13-505.5 of the Illinois Act.[56]

Section 13-801 was enacted in 2001 as the next stage in the legislature's drive to open SBC's markets to competition. The statute explicitly states that any of its provisions that "impose[] requirements or obligations . . . that exceed or are more stringent than those obligations imposed by" federal law or regulations apply to carriers "subject to regulation under an alternative regulation plan."[57] As the ICC noted in rejecting Illinois Bell's argument that the state could not impose unbundling requirements beyond those found in federal law, SBC bears "additional obligations as the price to pay for being the only [incumbent carrier] being regulated under an alternative form of regulation."[58]

2. Section 13-801 Imposes Obligations on SBC that are in Addition to the Obligations Imposed by Section 251.

Section 13-801 of the Illinois Act requires by its express terms that SBC provide competing CLECs with access to SBC's network at every conceivable point in the LEC's network, including ***line sharing and access to the high frequency portion of SBC's loop,*** regardless of the FCC's order. Section 13-801(b) provides that an ILEC "shall provide for the facilities and equipment of any requesting telecommunications carrier's interconnection with the [ILEC] network on just, reasonable, and nondiscriminatory rates, terms, and conditions . . . at

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Network Service Tariff, ICC Docket Nos. 95-0458/0531, (Consol.), *Order,* June 26, 1996 ("*Wholesale/Platform Order*".)

[56] *Wholesale/Platform Order* at 64.

[57] 220 Ill. Comp. Stat. 5/13-801(a).

[58] Order, *Illinois Bell Telephone Company Filing to implement tariff provisions related to Section 3-801 of the Public Utilities Act*, ICC Docket No. 01-0614, 2002 Ill. PUC LEXIS 564, ¶ 41 (rel. June 11, 2002) ("*Order*").

any technically feasible point within the incumbent local exchange carrier's network. . . that is at least equal in quality and functionality to that provided by the incumbent local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the incumbent local exchange carrier provides interconnection.[59] In addition, SBC is required (by virtue of it being subject to Alternative regulation) to provide its network elements in combinations to provide a telecommunications service.[60] And, SBC is required to provide CLECS with access to digital loops within 5 days of an order, and is required to provide CLECs with access to the high frequency portion of the loop within 24 hours![61]

Section 251 of the federal Act requires that CLECs be "impaired" in their ability to serve customers without access to ILEC network elements. However, Section 13-801 (and Section 13-505.6) contains no such requirement; The ICC has already held that:

> Of import here is the fact that there is no mention of "necessary" or "impair" in the definition of network elements, which speaks solely to, apparently, any "facility or equipment used in the provision of telecommunications service."[62]

Under §13-801 a CLEC is only required to demonstrate that access to the network element at issue is "technically feasible." The ICC determined that it was "technically feasible" for CLECs to access SBC's Project Pronto DSL architecture in its Project Pronto Unbundling Orders. Specifically:

> The Commission agrees with Staff and Intervenors that it is technically feasible to provide Project Pronto as UNEs.[63]
>
> The Commission finds that Ameritech-IL has failed to demonstrate that line sharing over its Project Pronto network is not technically feasible. As a matter of

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[59] 220 ILCS 5/13-801(b).

[60] 220 ILCS 5/13-801(d).

[61] 220 ILCS 5/13-(d)(5).

[62] ICC 01-0614 Order, p. 31.

[63] Project Pronto Unbundling Order, at 22.

> fact, Ameritech-IL's own witness established that line sharing over Project Pronto is feasible.[64]

Accordingly, SBC must continue to provide access to its Project Pronto DSL architecture pursuant to Section 13-801 of the Illinois Public Utilities Act.

3. Section 13-801 is Required to be Read Liberally to Effect the Pro-competitive Intentions of that Section.

In 2001, SBC filed its state tariff to implement Section 13-801, and the Commission initiated ICC Docket No. 01-0614. In that proceeding, the ICC Staff asserted, correctly, that Section 13-801, as a remedial statute, is required to be given liberal meaning in its construction. See ICC Staff Br. P. 6-7, ICC Dkt. No. 01-0614, filed January 11, 2002.[65] Indeed, the ICC Staff argued that:

> This, while seemingly unimportant, is a significant matter, which has a substantial impact on the proper construction that the Commission should give to Section 13-801. This is because remedial statutes are entitled to liberal construction to effectuate the remedial purposes intended by the legislature. *See, e.g.,* Bd. of Trustees of Community College Dist. No. 508 v. Human Rights Comm'n, 88 Ill.2d 22, 26; --- (1981); Zehender & Factor, Inc. v. Murphy, 386 Ill. 258, 262-63; 53 N.E.2d 944 (1944). "A liberal construction is ordinarily one which makes the statutory rule or principle apply to more things or in more situations than would be the case under a strict construction." Boaden v. Dept. of Law Enforcement, 171 Ill.2d 230, 246; 664 N.E.2d 661 (1996)(Freeman, J., specially concurring), *citing* 3 N. Singer Sutherland Statutory Construction § 60.01 (5th ed. 1992). Accordingly, a remedial statute is to be "made to apply to all cases which, by a fair construction of its terms, it can be made to reach." Id., *citing* Smith v. Stevens, 82 Ill. 554, 556 (1876).

In light of the foregoing, the ICC is required to apply Section 13-801 literally, and liberally, to reaffirm its orders unbundling SBC's Project Pronto facilities.

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[64] Project Pronto Unbundling Order, at 24.

[65] *Citing McDonald's Corp. v. Levine*, 108 Ill.App.3d 732, 738; 439 N.E.2d 475 (2nd Dist. 1982) (a statute is remedial when it gives rise to a cause of action to recover compensation for injuries or damages suffered by the aggrieved party).

B. The Commission Has Held, In Approving SBC's *271 Application* That SBC is Required to Make Available its Broadband UNE.

In seeking the Commission's endorsement of its request for authority to provide in-state interLATA services pursuant to Section 271 of the Telecommunications Act, SBC committed to providing access to its Project Pronto network architecture and the Broadband UNE as in compliance with the Commission's Project Pronto orders in Docket 00-0393. As the Commission's order in Docket 01-0662 noted:

> 1445. AI is unclear as to exactly what obligation the CLECs claim it was subject to under the now-vacated FCC rules. According to AI, AT&T witness Fettig testified during cross examination that AT&T's proposal speaks to the CLECs request for an end-to-end Broadband UNE. (Tr. 1831-1833). If this be the case, AI contends, the complaint is unwarranted because it will provide CLECs with access to the end-to-end Broadband UNE that the Commission ordered in Docket 00-0393, to the extent the applicable facilities are deployed.[66]

The Commission relied on the representations of SBC in reaching its conclusion that it would support SBC's request to provide in-state interLATA services. SBC should not now be allowed to equivocate concerning or renege on that commitment.

Conclusion

For each of the foregoing reasons, AT&T Communications, Inc. Covad Communications Company and WorldCom, Inc. d/b/a MCI respectfully request that the Commission reaffirm its prior orders, and compel SBC to comply with the terms of these orders. The Intervening CLECs request oral argument on the issues presented in these comments.

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[66] *Investigation Concerning Illinois Bell Telephone Company's Compliance with Section 271 of the Telecommunications Act of 1996*, Docket 01-0662, Phase 2 Order on Investigation, May 13, 2003 ("*271 Order*"), paragraph 1445, p. 377

Respectfully submitted,

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